No. 88-1861

Supreme Court, U.S.
FILED
JUN 12 1989
JOSEPH F. SPANIOL, JR
CLERK

In The

Supreme Court of the United States

October Term, 1988

1. JAMES STRYKER and HENRY GROSSKLAGS,
Petitioners,
v.
WILLIAM EDWARD DECKER and LINDA DECKER,
Respondents.

2. THOMAS LOUGHLIN,
Petitioner,
v.
DAVID EUGENE GERSCH,
Respondent.

3. CITY AND COUNTY OF DENVER, MAYOR FEDERICO PENA, OFFICER CHRIS HOAG, CHIEF THOMAS COOGAN and J.D. MacFARLANE,
Petitioners,
v.
JO ANN HIGHT-BERRY,
Respondent.

4. JAMES KUKURIS, JOHN SPEZZE, KEITH COWGILL, JOHN PRICE and the CITY AND COUNTY OF DENVER,
Petitioners,
v.
JERRY ZAPP and RUTH ZAPP,
Respondents.

BRIEF OF RESPONDENTS WILLIAM EDWARD DECKER AND LINDA DECKER IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF COLORADO

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June 12, 1989

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I. QUESTION PRESENTED

Have subsequent orders by the trial court rendered moot the questions raised by petitioners Stryker and Grossklags.

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JURISDICTION

Subsequent to the decision of the Colorado Court of Appeals dismissing the appeal taken by Stryker and Grossklags, the trial court entered an order dismissing respondents' claims under 42 U.S.C. § 1983 [Appendix A]. The trial court later granted respondents' leave to file a Third Amended Complaint stating new claims under 42 U.S.C. § 1983 [Appendix B]. The order by the trial court dismissing these respondents' claims under 42 U.S.C. § 1983 has rendered moot the questions raised by petitioners Stryker and Grossklags. Though new claims under 42 U.S.C. § 1983 have been stated against petitioners Stryker and Grossklags, review of assertions of immunity from trial on those new claims is not ripe since no decision has been made by the trial court or the Colorado Appellate Courts as to whether petitioners Stryker and Grossklags are entitled to immunity on the new claims.

CONCLUSION

For these reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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DISTRICT COURT, COUNTY OF SUMMIT,
STATE OF COLORADO
Civil Action No. 86 CV 323

ORDER

(Filed April 17, 1989)

WILLIAM EDWARD DECKER and LINDA DECKER,

Plaintiffs,

vs.

INVESTIGATOR KIRBY HODGKIN, SUMMIT COUNTY SHERIFF'S DEPARTMENT, JAMES STRYKER, HENRY GROSSKLAGS, SILVERTHORNE POLICE DEPARTMENT and THE CITY OF SILVERTHORNE, COLORADO,

Defendants.

THE COURT, having considered Defendants Kirby Hodgkin's and the Summit County Sheriff Department's (Sheriff Department's) Motion for Summary Judgment and the Response and Reply, along with the pleadings and exhibits appended to these documents,

AND BEING fully advised in the premises, enters the following findings and Order:

1. Hodgkin and the Sheriff's Department move for summary judgment in their favor and against Plaintiffs arguing:

a. Defendant Hodgkin is entitled to qualified good faith immunity;

b. A public employee is liable for only willful and wanton actions and the evidence does not support any such acts or omissions;

c. Summit County and not the Summit County Sheriff's Department is the proper Defendant;

d. Summit County enjoys sovereign immunity pursuant to C.R.S. 24-10-108 and is therefore immune from suit; and

e. Plaintiffs have failed to plead the existence of a policy or custom required to sustain a claim based on 42 USC 1983.

2. Hodgkin argues that qualified immunity acts to shield law enforcement officials from civil liability where a reasonable but mistaken belief exists as to the presence of probable cause to arrest or search. *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092 (1986). He further argues that where a law enforcement officer exercises his judgment in making difficult determinations, and where his judgment is objectively reasonable, he should not be held personally liable in damages. *Anderson v. Creighton*, 483 U.S.___, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727 (1982); *Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d 642 (10th Cir. 1988).

3. Hodgkin also argues that where the defendant's subjective intent is an element of the plaintiff's claim and the defendant moves for summary judgment based upon a showing of the objective reasonableness of his action, *the plaintiff may avoid summary judgment only by pointing to specific evidence that the official's actions were improperly motivated. Pueblo, supra.*

4. Lastly, Hodgkin argues that a public employee shall not be liable for injuries unless his actions were willful and wanton pursuant to CRS 24-10-105 and Plaintiffs have failed to support their allegations with any specific facts tending to show willful and wanton behavior. *See Pueblo, supra.*

5. The Sheriff's Department argues Summit County is the appropriate defendant and that as such it is, nevertheless, a public entity immune from any state tort claims. The Sheriff's Department also argues Summit County has not waived immunity.

6. Lastly, the Sheriff's Department argues Plaintiffs have failed to allege a custom or policy on the part of the Sheriff's Department or Summit County required by 42 USC 1983 which caused Plaintiffs to be deprived of the constitutionally protected right to be free from unreasonable searches and seizures.

7. Plaintiffs incorporate by reference their Response and exhibits included in their response to the Silverthorne Defendants Motion for Summary Judgment previously decided. Plaintiffs argue genuine questions of fact exist as to:

a. Whether Plaintiff Decker resembled the subject fugitive's picture and description;

b. Whether the time Plaintiff was detained was reasonable under the circumstances;

c. Whether the dispatcher broadcasted a description of the fugitive Decker and whether the recording of the dispatch was destroyed to cover-up evidence of misconduct;

d. Whether the Sheriff's Department maintains a policy which calls for officers to arrest persons with names similar to the name of a wanted person without further inquiry as to whether the person to be arrested is the same person as the wanted person;

e. Whether the dispatcher directs the arrest;

f. Whether the individual Defendants were acting within the scope of their duties; and

g. That in light of the Court's previous Order denying summary judgment the present motion for summary judgment is frivolous.

8. Defendants herein reply that Plaintiffs' response lacks authority and speculates on facts which are unsupported by *any* evidence in the record. Defendants argue that suits against government officials impel the application of a standard more demanding of plaintiffs when public official defendants move for summary judgment on the basis of their qualified immunity. Defendants reassert that Plaintiffs may avoid summary judgment *only* by *pointing to specific evidence* that the official's actions were improperly motivated. *Pueblo, supra*. Defendants argue that Plaintiffs' dreamed up facts and inferences drawn from such facts do not "specifically point" to conduct which was not "objectively reasonable" on the part of Hodgkins or the Sheriff's Department.

9. The Court finds Defendants' Hodgkins and the Sheriff Department's Motion for Summary Judgment meritorious in part. The Court finds the Sheriff's Department is a public entity and as such is immune from any state tort claims alleged by Plaintiffs pursuant to CRS

24-10-105 and 106. The Court therefore dismisses Plaintiffs' First, Second and Third Claims for relief which allege state tort claims against the Summit County Sheriff's Department.

10. Next, the Court finds questions of fact exist precluding summary judgment in favor of Defendant Hodgkin against the Plaintiffs with regards to Plaintiffs' state tort claims. Pursuant to CRS 24-10-105 the Court finds questions of fact may exist as to whether Defendant Hodgkin has good faith, qualified immunity immunizing him against Plaintiffs' First, Second and Third Claims for Relief. The Court finds factual questions may also exist as to whether Defendant Hodgkin's complained of acts or ommissions were "willful and wanton" pursuant to CRS 24-10-105 thus summary judgment is improper at least at this time.

11. Lastly, as to Plaintiffs' Fourth and Fifth Claims, the Court finds conduct by persons or entities which is properly plead as wrongful under 42 USC 1983 cannot be immunized by state law. However, the Court finds particular and specific facts alleging a policy or custom on behalf of the individual and/or entity allegedly violating Plaintiffs' constitutionally protected right must be plead.

12. Upon reviewing Plaintiffs' Fourth and Fifth Claims for Relief, the Court concludes no policy or custom is alleged in Plaintiff's Second Amended Complaint against any of the Defendants. The Court finds it erroneously previously found Plaintiffs had plead such required policy or custom when, in fact, Plaintiffs had merely argued the possible existence of such policy or custom. The Court now concludes Plaintiffs have failed to

allege by any specific facts the real existence of any such policy or custom against *any* of the Defendants. The Court thus determines dismissal of Plaintiffs' Fourth and Fifth Claims alleging 42 USC 1983 claims against all the Defendants proper.

13. The Court thus dismisses Plaintiffs' state and federal claims against the Sheriff's Department; dismisses Plaintiffs' Fourth and Fifth Claims against all Defendants; denies Defendant Hodgkins' Motion for Summary Judgment as to Plaintiffs' First, Second and Third Claims for Relief; and amends its Order entered April 12, 1988 consistant with the findings and Order herein.

DONE AND SIGNED this 17th day of April, 1989.

BY THE COURT:

/s/ W. Terry Ruckriegle
W. Terry Ruckriegle, District Judge

DISTRICT COURT, COUNTY OF SUMMIT,
STATE OF COLORADO
Civil Action No. 86 CV 323

ORDER
(Filed May 11, 1989)

WILLIAM EDWARD DECKER and LINDA DECKER,

Plaintiffs,

vs.

INVESTIGATOR KIRBY HODGKIN, SUMMIT COUNTY SHERIFF'S DEPARTMENT, JAMES STRYKER, HENRY GROSSKLAGS, SILVERTHORNE POLICE DEPARTMENT and THE CITY OF SILVERTHORNE, COLORADO,

Defendants.

THE COURT, having considered Plaintiffs' Motion to Reconsider, Modify and Correct Order for Certification under Rule 54(b) and to Further Amend Complaint and the Responses thereto,

AND BEING fully advised in the premises, enters the following findings and Order:

1. The Court has considered the Plaintiffs' proposed Third Amended Complaint submitted with their above titled motion. The Court finds therein Plaintiffs have, for the first time, alleged by specific facts and not merely by counsel's unsupported arguments, the existence of not only a custom or policy but other specific acts which, if proven, would allow relief to be granted in Plaintiffs favor and against the named Defendants.

2. The Court also notes Plaintiffs have admitted their inability until the present to precisely articulate their federal claims against the Defendants. *See* Plaintiffs' Motion to Reconsider, page 4, paragraph 7.

3. The submitted Third Amended Complaint represents Plaintiffs' fourth attempt to plead sufficient facts to support a claim under 42 USC 1983. The Court recognizes that an enormous amount of time and expense has been incurred by all parties herein due at least in part to Plaintiffs pleading.

4. The Court further finds the case has not been set for trial even though it was filed nearly three years ago.

5. The Court has also considered its own error in determining that a custom or policy was required to support a claim based upon 42 USC 1983 against the individually named Defendants.

6. Having considered the above circumstances, and considering that leave to file amended complaints shall be freely given when justice so requires pursuant to C.R.C.P. Rule 15, the Court finds it has little choice but to allow Plaintiffs to file the submitted Third Amended Complaint. The Court shall allow such Third Amended Complaint to be filed, however, only as to the individually named Defendants. The Court determines significant prejudice would result to the previously dismissed public entities if it were to allow Plaintiff's Third Amended Complaint to be filed against these Defendants at this time. In conjunction herewith, the Court certifies the portion of its previous Order dismissing the Defendant public entities as final pursuant to Rule 54(b).

7. The Court thus grants Plaintiffs Motion to Reconsider and to file the Third Amended Complaint, and to Certify the previous dismissal of Defendants Summit County Sheriff's Department, Silverthorne Police Department and The City of Silverthorne as final pursuant to Rule 54(b).

DONE AND SIGNED this 11th day of May, 1989.

BY THE COURT:

/s/ W. Terry Ruckriegle
W. Terry Ruckriegle, District Judge